No. 86-1416

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM MOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court committed plain error by admitting into evidence the testimony of a government witness concerning a provision of a plea agreement that required the witness to take a polygraph examination if requested to do so by the government.

2. Whether conspiracy to engage in a narcotics offense, in violation of 21 U.S.C. 846, may serve as one of the predicate offenses for a conviction of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1986. The petition for a writ of certiorari was filed on February 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. III) 848; and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 20 years' imprisonment

without possibility of parole, to be followed by a five-year probation period, and he was fined $125,000.[1]

The evidence at trial showed that one Larry Lavin headed a large-scale cocaine distribution operation. In 1981, for example, the operation purchased approximately 250 kilograms of cocaine for resale at a price of between $54,000 and $56,00 per kilogram.[2] Lavin's representatives purchased the cocaine in Florida and transported it to Philadelphia by commercial airline or car, depending on the size of the load. The cocaine was sold to customers in many states.

Petitioner was one of Lavin's largest customers. Before 1981, petitioner purchased his cocaine premixed and ready for sale. In early 1981, Lavin directed one of his associates to teach petitioner how to prepare and cut cocaine for individual orders so that petitioner could purchase pure cocaine and process it himself. The associate also taught petitioner how to test the cocaine for purity. From that time on, petitioner bought pure, uncut cocaine at close to cost, often investing in shipments from Florida by paying Lavin for the cocaine in advance.

Under Lavin's guidance, petitioner built his own distribution organization—under the umbrella of the Lavin operation—by using the Lavin model. Whenever Lavin introduced new distribution techniques, petitioner implemented them as well. For example, when petitioner learned that Lavin's workers were able to make recompressed rocks of cocaine look like solid rocks, petitioner had a Lavin associate teach the process to one of his own workers.

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[1] Petitioners' co-defendants, Vito Mirro and Pasquale Giordano, also were convicted of various narcotics offenses.

[2] The factual summary is taken from the government's brief in the court of appeals.

Like Lavin, petitioner insulated himself from the day-to-day operation of the enterprise by setting up a system of managers and workers. In 1980, he hired co-defendant Vito Mirro to manage his cocaine sales. Mirro was replaced in 1983 by Nicky Bongiorno and in 1984 by petitioner's brother Vincent Motto. Although petitioner employed a number of managers and workers, he preferred to select the cocaine himself to ensure that it was of the highest quality. In addition, when petitioner's workers delivered money to Lavin, Lavin's workers attributed the payments to petitioner on their drug ledgers.

In the summer of 1983, Lavin—concerned that he was under investigation by law enforcement authorities—sold to Franny Burns the "rights" to supply cocaine to Lavin's larger customers. Lavin had offered to sell these rights to petitioner, but petitioner rejected the offer because he thought he "would be buying the heat." After the sale, Burns sold many multi-kilogram loads of cocaine to petitioner.

In 1984, petitioner, Burns, and Bruce Taylor, who inherited Lavin's small customers, continued to contact Lavin to discuss their cocaine dealings. Thus, in a telephone conversation, Lavin told Taylor that he had just spoken to petitioner about the availability of methanol, a chemical used in testing the purity of cocaine. Petitioner and Bongiorno also called Lavin. When Taylor was arrested, Lavin was the first person he contacted; petitioner, his brother, and Burns subsequently met to discuss the arrest. After Lavin and Burns were indicted in September 1984, Lavin collected cocaine debts for Burns, including approximately half a million dollars that was owed by petitioner. Petitioner told one of Lavin's associates that he had made millions of dollars from the cocaine business.

On appeal, petitioner raised several challenges to his convictions. The court of appeals rejected those arguments and entered a judgment order affirming petitioner's convictions (Pet. App. A1-A3).

ARGUMENT

1. Twelve of the government's witnesses testified at trial pursuant to negotiated plea agreements. Each plea agreement provided that the witness could be required, at the government's option, to take a polygraph examination to test the truthfulness of his disclosures. On direct examination, the first government witness testified concerning the polygraph provision in his plea agreement (1 Supp. App. 88). Petitioner contends (Pet. 4-5) that the trial court's failure to exclude that testimony constituted reversible error.

Several courts have held that evidence of a witness's willingness to take a polygraph examination is inadmissible. See *United States* v. *Hilton*, 772 F.2d 783, 785-786 (11th Cir. 1985); *United States* v. *Brown*, 720 F.2d 1059, 1069-1075 (9th Cir. 1983); *United States* v. *Bursten*, 560 F.2d 779, 785 (7th Cir. 1977). But petitioner did not object to the admission into evidence of the testimony regarding the polygraph provision; the only objection was made by petitioner's co-defendant Pasquale Giordano (1 Supp. App. 88).[3] Accordingly, petitioner is entitled to the reversal of his convictions only if he establishes that the district court's ruling constituted plain error that "affect[ed] substantial rights" (Fed. R. Crim. P. 52(b)). He cannot make that showing, for two reasons.

First, petitioner used the polygraph provision of the plea agreements as the centerpiece of his effort to impeach the credibility of the government's witnesses. Thus, petitioner's counsel repeatedly cross-examined the government witnesses about the polygraph provision and about the government's failure to require the witnesses to submit to

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[3] At the start of trial the court instructed the defense attorneys that if they intended to join in any objection made by other counsel during trial, they should specifically so indicate (1 Supp. App. 2-3). Petitioner did not join in Giordano's objection.

polygraph tests (1 Supp. App. 143, 467-468, 512-514, 850; 2 Supp. App. 1078-1079, 1269, 1438-1439, 1683, 1801-1802; 3 Supp. App. 2068, 2699-2700); on three occasions his counsel even read the polygraph provision into the record (2 Supp. App. 1079; 3 Supp. App. 2700, 2929). Petitioner's counsel described the polygraph provision as integral to the "entire defense," and he objected to any "statement to the Jury that the polygraph test is not a reliable test" for fear that the defense would be undercut (3 Supp. App. 2087).

Following the direct examination of its first witness, the government carefully avoided reference to the polygraph provision on direct examination; it returned to the subject only after the defense had questioned nine witnesses about the provision, and for the sole purpose of adducing evidence that one of the government's witnesses had taken the examination and had failed it (2 Supp. App. 1927-1928).[4] Furthermore, the government made no attempt to exploit the polygraph provision in its closing argument.

Petitioner's trial counsel obviously concluded that informing the jury of the existence of the polygraph provisions would be *helpful* to petitioner's effort to impeach the government's witnesses; he therefore took every opportunity to refer to the existence of those provisions. Petitioner cannot now claim that the same information was *harmful* to his case on the ground that it bolstered the witnesses' credibility, especially where his own counsel was responsible for emphasizing the importance of the polygraph provision. Cf. *United States* v. *Chilcote*, 724 F.2d 1498, 1504 (11th Cir.), cert. denied, 467 U.S. 1218 (1984).

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[4] The prosecutor explained (2 Supp. App. 1928) that he adduced the evidence in anticipation that the defense intended to make an issue of the witness's failure to pass the examination, a fair assumption given the defense's previous repeated use of the polygraph provisions in the plea agreements.

Second, in view of the overwhelming evidence supporting petitioner's convictions, the reference to a polygraph test in the direct examination of the first government witness was, at most, harmless error. As we have noted, the record contains abundant evidence supporting the jury's determination that petitioner engaged in a variety of drug offenses. The admission of the reference to the polygraph provision in the witness's plea agreement therefore could not have affected the outcome of the case.

The decisions of the other courts of appeals do not dictate a different result. The defendants in each of the other cases objected to the admission of the evidence regarding polygraph tests; the courts of appeals therefore were not called upon to apply a plain error standard. See *United States* v. *Hilton*, 772 F.2d at 785-786; *United States* v. *Brown*, 720 F.2d at 1070; *United States* v. *Bursten*, 560 F.2d at 785. Moreover, despite the defendants' contemporaneous objection, the court in the *Bursten* case declined to reverse the defendant's convictions, finding that the admission of the reference to polygraph testing was harmless error (560 F.2d at 785). Those decisions therefore do not justify a finding of plain error on the facts of this case.

2. Petitioner contends (Pet. 5-7) that the district court erroneously instructed the jury that it could not convict him on the continuing criminal enterprise (CCE) count without using as a predicate offense the Section 846 conspiracy charged in Count 1 of the indictment.[5] Petitioner is wrong in asserting that the district court instructed the jury that it was *required* to use the Section 846 conspiracy as a predicate offense in order to convict petitioner on the CCE count; the court told the jury that it *could* use the

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[5] In order to prove a continuing criminal enterprise, the defendant must be shown to have engaged in a "continuing series of [narcotics] violations" (21 U.S.C. 848(b)(2)).

conspiracy as a predicate offense (Pet. App. A5-A6; 4 Supp. App. 3847-3848). The instruction was thus permissive, not mandatory.

Furthermore, the instruction was correct. The language of Section 848(b)(1) unambiguously states that a violation of "any provision of [either subchapter I or II of Chapter 13 of Title 21] the punishment for which is a felony" constitutes a permissible predicate offense. Since the statutory provision proscribing drug conspiracies (21 U.S.C. 846) is contained in the relevant portion of Title 21, a violation of that provision may serve as a predicate offense. Petitioner has pointed to nothing in the legislative history of the CCE provision indicating that Congress intended to forbid the use of a drug conspiracy charge as a predicate offense for a CCE conviction. See H.R. Rep. 91-1444, 91st Cong., 2d Sess., Pt. 1, at 50 (1970).

Several courts of appeals have concluded that a conspiracy offense may serve as one of the predicate offenses for purposes of a CCE charge. See *United States* v. *Grayson*, 795 F.2d 278, 285-286 (3d Cir. 1986), cert. denied, No. 86-6163 (Apr. 20, 1987); *United States* v. *Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986); *United States* v. *Young*, 745 F.2d 733, 748-752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Brantley*, 733 F.2d 1429, 1436 n.14 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Middleton*, 673 F.2d 31, 33 & n.2 (1st Cir. 1982).

The Fourth Circuit has indicated, in dictum, that a conspiracy offense may not be used as the principal predicate offense for the CCE charge. *United States* v. *Lurz*, 666 F.2d 69, 76 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982); see also *United States* v. *Jefferson*, 714 F.2d 689, 702 n.27 (7th Cir. 1983) (reciting *Lurz* rule in dictum). But that court more recently intimated that its prior statement on the issue might have been incorrect. It has also made clear that *Lurz* related only to the principal felony offense

underlying the CCE conviction; it did not prohibit the use of a conspiracy offense to show the series of predicate acts required to establish a CCE violation. See *United States* v. *Ricks*, 776 F.2d 455, 464 n.16 (4th Cir. 1985), cert. denied, No. 86-759 (Dec. 8, 1986). The Fourth Circuit rule therefore appears to be unsettled at the present time.[6]

Moreover, there plainly is no conflict between the Fourth Circuit standard and the decision in the present case. The defendant in *Ricks* had failed to object to the jury instructions relating to the use of the drug conspiracy offense as a predicate for the CCE charge; under those circumstances, the Fourth Circuit held that those instructions were not plain error (776 F.2d at 463-464). Petitioner similarly failed to interpose an objection to the instruction in this case. It is therefore clear that the Fourth Circuit would have reached the same result as the court below on the facts of this case. Accordingly, this case presents no conflict among the circuits and does not warrant review by this Court.

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[6] In *Jeffers* v. *United States*, 432 U.S. 137 (1977), a plurality of this Court found that a defendant in some circumstances may not receive cumulative punishment for a CCE conviction and a drug conspiracy conviction. Petitioner does not argue that the result in *Jeffers* bars the use of conspiracy as a predicate offense. The conspiracy charge in *Jeffers* itself did not serve as a predicate for the CCE conviction (see 432 U.S. at 141, 142-143 (plurality opinion)). Indeed, even if CCE and conspiracy charges cannot be brought in separate proceedings and are not subject to cumulative sentences, that fact would not mean that Congress intended to exempt a drug trafficker from liability for CCE simply because one of the offenses involved in his series of three violations was a conspiracy. See *United States* v. *Young*, 745 F.2d at 750-751. The decisions of the court of appeals cited by petitioner (other than *Lurz*) address the multiple punishment question and therefore are irrelevant here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

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